



PUBLIC NOTICE

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DA 13-1985
September 27, 2013

**CGB's OFFICE OF NATIVE AFFAIRS AND POLICY AND WTB RELEASE SCOPING
DOCUMENT TO INITIATE TRIBAL CONSULTATION ON A PROPOSED PROGRAM
COMMENT TO GOVERN REVIEW OF POSITIVE TRAIN CONTROL FACILITIES UNDER
SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT**

WT Docket No. 13-240

By this Public Notice, the Consumer and Governmental Affairs Bureau's (CGB) Office of Native Affairs and Policy (ONAP) and the Wireless Telecommunications Bureau (WTB) initiate and invite government-to-government consultation with and input from federally recognized Tribal Nations, their Tribal Historic Preservation Officers (THPOs), and other Tribal cultural preservation officials regarding the development of a proposed Program Comment to govern review of positive train control (PTC) wayside facilities construction under Section 106 of the National Historic Preservation Act (NHPA).¹ The ideas being considered for the potential Program Comment and consultation are described in the attached Program Comment For Planned Construction of Positive Train Control Facilities Within the Railroad Bed Section 106 Scoping Document for Consultation with Tribal Nations (Tribal Nations Scoping Document), which is also being conveyed directly to Tribal leaders, THPOs and cultural preservation officials pursuant to our federal trust responsibility to Tribal Nations.

In addition, the WTB is today releasing a separate, but substantially similar, Public Notice (WTB Public Notice) and attached scoping document (WTB Scoping Document) seeking public comment and inviting the participation of State Historic Preservation Officers (SHPOs) and other stakeholders, including the railroad companies.² The comment filing deadline for the WTB Public Notice is November 6, 2013. Reply Comments are not sought. The Tribal Nations Public Notice does not have a comment period as it will be used to initiate formal consultations. Input and information shared with the FCC, WTB and ONAP during the consultation process will be placed in the WTB docket. Specific instructions for commenting appear in the WTB Public Notice and at the end of this notice.³

¹ 16 U.S.C. § 470f.

² See *Comment Sought on Scoping Document For Development of a Proposed Program Comment To Govern Review of Positive Train Control Facilities Under Section 106 of the National Historic Preservation Act*, Public Notice, WT Docket No. 13-240, DA 13-1980 (rel. Sept 27, 2013)(WTB Public Notice)(attaching the *Program Comment For Planned Construction of Positive Train Control Facilities Within The Railroad Bed Section 106 Scoping Document*)(WTB Scoping Document).

³ See *id.* at 2-3 (filing instructions for commenters).

As described more fully in the Tribal Nations Scoping Document, PTC is mandated by the Rail Safety Improvement Act of 2008,⁴ which requires all of the major freight and passenger railroads to deploy PTC systems along most segments of their track by December 31, 2015. To meet this statutory mandate, the freight railroads are preparing to install more than 20,000 wayside poles, between 25 and 65 feet in height, approximately one to two miles apart along their tracks and at certain switch points and other operational sites. Because these poles will support antennas that will use radio spectrum licensed by the Commission, the Commission considers the installation of PTC infrastructure to be an FCC undertaking under the NHPA.

To comply with its obligations under the NHPA, the Commission's rules require that applicants follow the Advisory Council on Historic Preservation (ACHP) regulations,⁵ as modified by two Nationwide Programmatic Agreements executed by the Commission with the ACHP and the National Conference of State Historic Preservation Officers,⁶ to ascertain whether proposed facilities may affect historic properties.⁷ However, the mandated completion date for PTC and the volume of wayside poles required present challenges to all those involved in the Section 106 process. A Program Comment, once adopted by the ACHP, would identify alternative procedures for an applicant to follow in order to ascertain, as required by Section 1.1307(a)(4) of the Commission's rules, whether proposed PTC wayside facilities may affect historic properties that are listed or eligible for listing in the National Register for Historic Places, including steps to ensure that Tribal Nations have a full opportunity to participate in review.⁸ In developing a Program Comment, the action agency is required to ensure appropriate government-to-government consultation with Tribal Nations.⁹ This Tribal Nations Public Notice and the accompanying Tribal Nations Scoping Document are intended to fulfill this procedural requirement, the Commission's trust responsibility as outlined in the FCC's *2000 Tribal Policy Statement*,¹⁰ and the federal government's trust responsibility to consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources.

This proceeding will be treated as exempt under the Commission's *ex parte* rules.¹¹ We find that treating this proceeding as exempt is in the public interest because: (1) the ACHP's Program Comment procedures require the Commission to gather facts, views, and information from multiple parties through consultation, including government-to-government consultation with Tribal Nations; (2) requiring *ex parte* filings for each conversation in the development of the Program Comment would be cumbersome,

⁴ P.L. 110-432 (2008).

⁵ 36 C.F.R. Pt. 800, Subpart B.

⁶ 47 C.F.R. Pt. 1, Apps. B and C.

⁷ See 47 C.F.R. § 1.1307(a)(4).

⁸ See 36 C.F.R. §§ 800.14(a), 800.14(e).

⁹ 36 C.F.R. § 800.14(e)(4),(f).

¹⁰ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Red 4078, 4081 (2000) (FCC's *2000 Tribal Policy Statement*).

¹¹ 47 C.F.R. § 1.1204; see 47 C.F.R. § 1.1200(a) ("Where the public interest so requires in a particular proceeding, the Commission and its staff retain the discretion to modify the applicable *ex parte* rules by order, letter, or public notice.").

would potentially inhibit the consultation process, and would likely delay its development; and (3) once developed, the Commission will submit the proposed Program Comment to the ACHP for approval, and publish notice of the availability of proposed Program Comment in the Federal Register, as required by ACHP regulations, thus giving all stakeholders a further opportunity to weigh in on the record at the decisional stage.¹²

Tribal Nations, THPOs or other Tribal cultural preservation officials wishing to file comments in the WTB docket may do so following the instructions in the WTB Public Notice¹³ and as follows:

Filing instructions: Interested parties may file comments on or before the date indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS").

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper should file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers should submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

Accessibility information: To request information in accessible formats (computer diskettes large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530(voice), (202) 418-0432(TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at www.fcc.gov.

CGB Office of Native Affairs and Policy contacts: Geoffrey Blackwell, (202) 418-3629 or Geoffrey.Blackwell@fcc.gov; Irene Flannery, (202) 418-1307 or Irene.Flannery@fcc.gov; or Rebekah Bina, (202) 418-7931 or Rebekah.Bina@fcc.gov.

¹² 36 C.F.R. § 800.14(a)(1). *See also* 36 C.F.R. § 800.14(e)(5)(i) (requiring that, if the ACHP comments, the agency shall publish notice in the Federal Register of the ACHP's comments).

¹³ *See* WTB Public Notice at 2-3 (filing instructions).

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We request that any Tribal Nation, THPO, or other Tribal cultural preservation official who reaches out to any FCC points of contact, please also send an e-mail containing your full contact information and a reference to this PTC scoping document to native@fcc.gov so the CGB Office of Native Affairs and Policy and WTB Spectrum and Competition Policy Division may most effectively coordinate on your responses to this scoping document and your involvement in our Tribal consultation efforts.